APPEALS BOARD
UTAH LABOR COMMISSION

JOHN BEENE, **Petitioner,** **vs.** **SBA NETWORK SERVICES and AMERICAN HOME ASSURANCE COMPANY,** **Respondents.**	**ORDER AFFIRMING ALJ'S DECISION** **Case No. 07-0581**

John Beene asks the Appeals Board of the Utah Labor Commission to review Administrative Law Judge Holley's denial of Mr. Beene's claim for benefits under the Utah Occupational Disease Act, Title 34A, Chapter 3, Utah Code Annotated.

The Appeals Board exercises jurisdiction over this motion for review pursuant to Utah Code Annotated § 63-46b-12, § 34A-3-102, and § 34A-2-801(3).

BACKGROUND AND ISSUE PRESENTED

Mr. Beene filed a claim for occupational disease benefits for a right shoulder injury allegedly caused by his employment with SBA Network Services ("SBA") from October 2006 through February 2007. Judge Holley held an evidentiary hearing and then denied benefits based on Mr. Beene's failure to establish that his work medically caused his right shoulder condition.

Mr. Beene argues that, because significant medical issues existed, Judge Holley should have referred the issue of medical causation to a medical panel.

FINDINGS OF FACT

Judge Holley's findings of fact are undisputed. In summary, Mr. Beene started working for SBA in October 2006 as a communication tower repairman. As part of his duties, Mr. Beene climbed the towers to install mounts, antennae, and coaxial cable. He alleges that this strenuous work activity and exposure during the four months he was employed for SBA caused his right shoulder condition.

Mr. Beene provided medical reports from several treating physicians to demonstrate his shoulder condition was caused by the work exposure. However, Dr. Whittington's Physician's First Report of Work Injury report failed to indicate whether Mr. Beene's work caused his right shoulder condition. Dr. Parker stated that the medical cause of Mr. Beene's right shoulder pain was

"unknown . . . but it could be related to the type of work he was doing." Dr. Skedros opined that Mr. Beene's condition "may have continued to inflame due to work-related repetitive trauma . . . At least this is one possible scenario that could explain his symptoms." In contrast, SBA's appointed physician, Dr. Knorpp, concluded that there was no medical causal connection with Mr. Beene's condition and his work with SBA.

DISCUSSION AND CONCLUSIONS OF LAW

Mr. Beene argues that the various medical opinions establish a significant medical dispute regarding the medical cause of Mr. Beene's right shoulder condition and therefore Judge Holley should have referred the question of causation to a medical panel. However, Rule 602-2-2 of the Commission Rules provides that medical panels will be used in those cases "where one or more significant medical issues may be involved. Generally, a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are . . . conflicting **medical opinions** related to causation of the injury or disease. . . ." (Emphasis added.)

The Appeals Board has carefully considered the medical record in this case and finds no conflict among the doctors' opinions. Specifically, short of speculation and conjecture of a possible link, none of Mr. Beene's treating physicians opine with reasonable medical probability that Mr. Beene's shoulder condition was caused by his work. Consequently, those opinions do not conflict with Dr. Knorpp's opinion of no medical causation and fail to create a significant medical dispute to warrant appointing a medical panel. The Appeals Board therefore concurs with Judge Holley's determination that no medical panel was warranted and that Mr. Beene's claim should be denied for lack of evidence of medical causation.

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ORDER

The Appeals Board affirms Judge Holley's decision. It is so ordered.

Dated this 27th day of May, 2008.

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Colleen S. Colton, Chair

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Patricia S. Drawe

DISSENT

I dissent. By statute and judicial pronouncement, the Labor Commission has broad discretion in determining which disputed medical issues shall be referred to a medical panel. See Utah Code Annotated §34A-2-601 and Roberts v. Labor Commission, 2006 UT App 403. The Commission has limited its discretion with the adoption of Utah Administrative Rule R602-2-2 which reads, in pertinent part, as follows:

> A. A panel will be utilized by the Administrative Law Judge where one or more significant medical issues may be involved. Generally a significant medical issue must be shown by conflicting medical reports. Significant medical issues are involved when there are:
> 1. Conflicting medical opinions related to causation of the injury or disease;
> 2. Conflicting medical reports of permanent physical impairment which vary more than 5% of the whole person;
> 3. Conflicting medical opinions as to the temporary total cutoff date which vary more than 90 days;
> 4. Conflicting medical opinions related to a claim of permanent total disability, and /or
> 5. Medical expenses in controversy amounting to more than $10,000. [Emphasis Added]

The majority, in their decision have defined a medical opinion as physician pronouncements which opine with "reasonable medical probability"; apparently, according to the majority, any statement by a physician which does not couch its opinion with the terms "reasonable medical probability" is insufficient to create a conflicting medical report and, thus, triggering the above quoted rule.

I believe this is too high of a standard under Rule R602-2-2. I certainly do not believe that the mere unsubstantiated allegations of a petitioner are sufficient to invoke the need for medical panel. However, in the case at hand, we have an injury which common sense indicates may be work related, we have the statements from two doctors that the injury may be work related, and we have the opinion from the doctor, hired by the insurance company who in close cases never seems to find worked related causation. I believe the Labor Commission, in this case, should exercise its discretion, consistent with R602-2-2, and refer the medical dispute to the panel.

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Joseph E. Hatch

NOTICE OF APPEAL RIGHTS

Any party may ask the Appeals Board of the Utah Labor Commission to reconsider this Order. Any such request for reconsideration must be received by the Appeals Board within 20 days of the date of this order. Alternatively, any party may appeal this order to the Utah Court of Appeals by filing a petition for review with the court. Any such petition for review must be received by the court within 30 days of the date of this order.